IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, Inc., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	No. 13-465C
v.	)	(Judge Sweeney)
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

PLAINTIFFS' STATUS REPORT CONCERNING ESI DATE RANGES

As directed by the Court's order of June 19, 2014 (Doc. 62), Plaintiffs respectfully submit this status report proposing date ranges governing the discovery of electronically stored information (ESI). Using the custodians and search terms on which the parties have agreed, Plaintiffs believe that appropriate date ranges for ESI discovery are June 1, 2011 to March 31, 2013 and April 1, 2008 to December 31, 2008. As explained below, targeting documents created within those date ranges would reduce the burden of discovery while properly focusing the Government's ESI search on periods likely to contain a large number of discoverable documents.

In addition, the Court suggested in its June 19 order that the "first wave" of discovery may be limited to production of documents created on or before August 17, 2012, the date of the Net Worth Sweep. Plaintiffs respectfully submit that, consistent with the Government's own proposal, as outlined in its briefing in support of its motion for protective order, the August 17, 2012 cut-off date should apply only to materials relating to the Government's assessments of Fannie's and Freddie's future profitability and to whether, when, and how the Fannie and Freddie conservatorships might end. As discussed below, with respect to all other issues as to which discovery has been authorized, a later cut-off date should apply.

In making this ESI proposal, Plaintiffs emphasize that the purpose of restricting the date

ranges within which the Government must search ESI is to reduce the burden and expense of discovery rather than to arbitrarily limit Plaintiffs' access to discoverable materials. Accordingly, the Government should produce *all* responsive, non-privileged materials returned by its ESI searches. As discussed at the June 19 hearing on the Government's motion for a protective order, the topic-specific date range proposal outlined in the Government's recent protective order reply brief could be read to entitle the Government to withhold documents from one date range on the ground that they are responsive only to a topic associated with another date range.[1] Such an approach, however, would make little sense because it would deny Plaintiffs access to responsive, non-privileged materials without doing anything to reduce the burden of discovery; since the Government will already be reviewing all documents returned by its ESI searches for both privilege and responsiveness, the Government will not suffer *any* additional burden if it is required to produce such relevant, responsive, non-privileged materials. The Government suggested, at the June 19 hearing, that it might be willing to produce all such responsive documents returned by its date-limited ESI searches notwithstanding the date such documents were created, *see* Tr. 56-57 (June 19, 2014); the Court should remove all doubt on that score by making clear that the Government should produce any responsive, non-privileged documents it reviews in connection with its ESI searches.[2]

[1] Under one reading of the Government's proposal, for example, a document from late 2008 discussing the standards governing when and how the conservatorships will end would not be disclosed unless also relevant to the Companies' solvency and expectations of profitability when the conservatorships began. *See* Def.'s Reply in Support of Mot. for Prot. Order at 18 (June 17, 2014) (Doc. 60) (hereinafter "Protective Order Reply").

[2] Because this proposal addresses the date ranges governing the Government's ESI searches, it is not intended to limit Plaintiffs' entitlement to non-ESI materials that are responsive to Plaintiffs' discovery requests and that are not privileged. Plaintiffs note, in this regard, that they have requested certain hard-copy documents that they know exist and that, Plaintiffs believe, are responsive to their requests; it is Plaintiffs' understanding that the Government is in the process of responding to that request. In addition, to the extent that the Government's pro-

I. The Court Should Order the Government To Search ESI Created from June 1, 2011 to March 31, 2013

The Court should authorize a search of the Government's ESI for the period from June 1, 2011 to March 31, 2013. The Government proposes a narrower date range—from January 1, 2012 to September 30, 2012 on one topic, and from January 1, 2012 to August 17, 2012 on another. But the better course is to use Plaintiffs' somewhat broader proposal.[3]

There is good reason to believe that materials highly relevant to the topics as to which the Court has authorized discovery—including materials relating to the Government's assessment of Fannie's and Freddie's future profitability (which would be directly relevant to both the Government's ripeness argument and the reasonable investment-backed expectations issue) and materials relating to the relationship between FHFA and the Treasury (which would be directly relevant to whether FHFA should be considered the United States for purposes of the Tucker Act)—date back to the second half of 2011. Late 2011 was in many respects a pivotal period for the Companies' future prospects, for it was then that Fannie and Freddie reported their final significant losses before beginning their dramatic recoveries. *See* Data as of Nov. 14, 2013 on Treasury and Federal Reserve Purchase Programs for GSE and Mortgage-Related Securities at 2

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ductions of materials in connection with its ESI searches disclose the existence of other documents that are responsive to Plaintiffs' discovery requests, Plaintiffs reserve the right to request the production of such documents regardless of the date on which they were created.

[3] Even the broader date restrictions proposed by Plaintiffs would not capture every responsive, non-privileged document in the Government's possession. For example, an internal Treasury memo created in late 2010 makes clear that Treasury was long "commit[ed] to ensur[ing] [that] existing common equity holders will not have access to any positive earnings from the GSEs in the future." *See* Memo from J. Goldstein, Under Secretary for Domestic Finance, to T. Geithner, Sec'y of Treasury (Dec. 20, 2010) (T201). The existence of that Treasury policy—disclosed for the first time in related litigation over the Net Worth Sweep—suggests that FHFA agreed to the Net Worth Sweep at Treasury's behest or otherwise to further the fulfillment of Treasury's stated "commitment."

(T4351).[4] Yet despite signs of improving conditions in the housing market and the Companies' increasingly healthy mortgage portfolios, an internal Treasury document drafted in late 2011 says that the Companies were "not expected to generate enough net income to cover required dividend payments and forecasted losses" in the future. Memo from C. Amir-Mokri, Assistant Sec'y for Fin. Insts., to T. Geithner, Sec'y of Treas. 2 (Dec. 21, 2011) (T2359). Similarly, in October 2011, FHFA released a set of financial projections for the Companies that predicted that they would continue to lose tens of billions of dollars over the coming years. *See* FHFA, Projections of the Enterprises' Financial Performance (Oct. 27, 2011). Treasury relied heavily on FHFA's pessimistic October 2011 forecast in developing its own excessively negative forecasts just before adopting the Net Worth Sweep in the middle of 2012.[5] Accordingly, information about the Government's gloomy assessments of the Companies' prospects during the final months of 2011 is closely linked to its similar assessments at the time of the Net Worth Sweep. Forecasts from both periods—and the underlying models, data, and assumptions on which they were based—should be disclosed in the first wave of discovery as directly relevant to both the Companies' future prospects and the reasonableness of Plaintiffs' investment-backed expectations at the time of the Net Worth Sweep.

Public statements by Edward DeMarco, then the Acting Director of FHFA, in late 2011 also suggest that documents from that period would provide valuable insight into whether FHFA

[4] Plaintiffs discuss this document, and the other documents cited in this status report, in order to provide illustrative examples of documents that are in the public record that support Plaintiffs' position that it is highly likely that relevant, responsive materials exist within the ESI date ranges Plaintiffs are proposing. Should the Court so desire, Plaintiffs would be happy to prepare and file an appendix containing copies of the cited documents. Page numbers identified as "T_" and "FHFA_" are citations to the administrative record in *Fairholme Funds, Inc. v. FHFA*, No. 13-1053 (D.D.C.).

[5] *See* Dep't of Treas., GSE Preferred Stock Purchase Agreements: Overview and Key Considerations (June 13, 2012) (T3837) (observing that "the FHFA . . . analys[is] w[as] used to generate the forecast estimates on the subsequent pages").

agreed to the Net Worth Sweep at Treasury's behest. In September 2011, Acting Director DeMarco told the American Mortgage Conference that his agency's statutory duty to "preserve and conserve the assets and property" of the Companies "directs us to minimize losses on behalf of taxpayers." E. DeMarco, Acting FHFA Director, Remarks at the American Mortgage Conference at 2 (Sept. 19, 2011) (FHFA 2394). Three months later, Acting Director DeMarco similarly testified before Congress that "with taxpayers providing the capital supporting the Enterprises' operations, this 'preserve and conserve' mandate directs us to minimize losses on behalf of taxpayers." Testimony of FHFA Acting Director E. DeMarco before House Financial Services Committee at 3 (Dec. 1, 2011) (FHFA 2638). Those statements suggest—and Government documents from the same period are likely to confirm—that FHFA considered itself obliged to put the interests of taxpayers ahead of the interests of the Companies and their investors. If true, that would make it more likely that FHFA considered itself bound to take directions from Treasury, the taxpayers' representative, or to otherwise act in Treasury's rather than the Companies' best interests, at the time of the Net Worth Sweep.[6]

Many documents created during the months *after* the Net Worth Sweep was announced are also likely to be highly relevant to the topics on which the Court authorized discovery. In March 2013, for example, a FHFA Inspector General report observed that the Companies "were experiencing a turnaround in their profitability" and that the Net Worth Sweep could result in "an extraordinary payment to Treasury." FHFA, OFFICE OF INSPECTOR GENERAL, ANALYSIS OF THE 2012 AMENDMENTS TO THE SENIOR PREFERRED STOCK PURCHASE AGREEMENTS at 11, 15

[6] In addition, there is every reason to believe that Treasury and/or FHFA were receiving and considering analyses of the Companies' future prospects prepared by third parties as early as 2011. Such analyses are highly likely to speak directly to such topics as the Companies' expected profitability at the time of the Net Worth Sweep and the role that Treasury played in connection with that decision.

(Mar. 20, 2013). That assessment of the Companies' prospects, made seven short months after the Net Worth Sweep was imposed, proved to be accurate and is highly relevant to the Companies' future prospects, to whether FHFA was acting in Treasury's interest or at its behest, as well as to the reasonableness of Plaintiffs' investment-backed expectations. Discovery targeting documents from late 2012 and early 2013 is likely to yield additional such documents.

It is also probable that documents created in the aftermath of the Net Worth Sweep will provide insight into the Government's policy on when and how the conservatorships will end. The Net Worth Sweep fundamentally changed the relationship between the Government and the Companies—functionally transforming what had been a majority interest in the Companies into complete ownership. What impact that transformation had, if any, on the Government's policy about when and how the conservatorships will end is a proper subject of discovery under this Court's order.

Finally, even if the Court does not order the Government, in connection with the "first wave" of discovery that is contemplated under the June 19 Order, to search and produce ESI created through March 31, 2013, it should at a minimum require a review and production of documents created during the weeks after the Third Amendment. The Government has suggested that, at least on the topic of whether FHFA acted at Treasury's behest, ESI should be searched through September 30, 2012. Protective Order Reply 18. Consistent with the Government's proposal, its declarants do not suggest that discovery on that topic through September 30, 2012 could harm the economy or interfere with FHFA's operation of the Companies. Yet the Court's June 19, 2014 order could be read to imply that the first wave of discovery will be limited to "documents that were created on or before August 17, 2012." Order (Doc. 62).

Plaintiffs submit that the September 30, 2012 cut-off date the Government proposed would be more appropriate given that documents created from August 18, 2012 through September 30, 2012 are very likely to discuss the Government's reasons for adopting the Third Amendment. Such post-decisional documents are not protected by the deliberative process privilege, *see NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-52 (1975), meaning that documents from those weeks could well represent the most significant non-privileged materials in the Government's possession. In view of the Government's previously expressed willingness to search for and produce some documents from that period and their potential importance to this case, the Court should clarify that during any "first wave" of ESI discovery, the Government must perform some type of ESI search through at least September 30, 2012 and should produce non-privileged responsive documents through that date relating to every authorized topic other than the topics placed in issue under the first part of the Government's protective order motion (*i.e.*, recent assessments of the Companies' future profitability and documents discussing whether, when, and how the conservatorships might end).[7]

II. The Court Should Order the Government To Search ESI Created from April 1, 2008 to December 31, 2008.

ESI discovery should also include documents returned by the parties' agreed-upon search terms and custodians created from April 1, 2008 to December 31, 2008. Documents created dur-

[7] With respect to ESI discovery relating to current assessments of the Companies' future profitability and the termination of the conservatorships, Plaintiffs understand that at least until the Court decides the Government's protective order motion, the Court intends to utilize an August 17, 2012 cut-off date. Plaintiffs' proposal of a March 31, 2013 cut-off date for ESI discovery is not intended to suggest that, should the Court deny this aspect of the Government's motion, ESI relating to these particular topics should be subject to a March 2013 cut-off date. Because these topics speak directly to the Government's argument that Plaintiffs' takings claim is not *currently* ripe, Plaintiffs have proposed to the Government that a more appropriate date range for ESI discovery on these topics is June 1, 2011 through March 31, 2014. Plaintiffs will be prepared to further address a proposed ESI cut-off date for these ripeness-related topics at an appropriate time.

ing that period are certain to contain information about the Companies' financial condition when the conservatorships were imposed on September 6, 2008—one of the topics on which the Court authorized discovery. *See* Disc. Order 3 (Feb. 26, 2014) (Doc. 32). And although the Government suggests a more limited date range on that topic—from July 1, 2008 to December 31, 2008—the broader period Plaintiffs propose is more appropriate.

Congress did not *enact* the Housing and Economic Recovery Act (HERA) until July 2008, but discussions over the financial assessments of the Companies that preceded (and in many respects prompted) HERA's enactment no doubt began well before then. Documents that reflect Treasury's contemporaneous assessments of the Companies' financial condition during that period are likely to reveal much about the Companies' condition when they were ultimately placed in conservatorship a few months later and about the role that Treasury played in subsequent conservatorship-related decisions such as the Net Worth Sweep. The Court should accordingly require the Government to include those documents in the first wave of discovery.

Limited discovery targeting documents created during the few months leading up to HERA's enactment is particularly appropriate given that numerous Government officials publicly stated that Fannie and Freddie were adequately capitalized shortly before they were placed in conservatorship. On July 10, 2008, for example, OFHEO Director James Lockhart (who would soon become the first Director of FHFA) said that the Companies were "adequately capitalized, holding capital well in excess of the OFHEO-directed requirement, which exceeds the statutory minimums." Statement of J. Lockhart, OFHEO Director, *available at* www.blownmortgage.com/ofheo-issues-statement-on-gses. Treasury Secretary Henry Paulson likewise told Congress in mid-July 2008 that "both GSEs remain adequately capitalized." Statement of Henry M. Paulson, Jr., Sec'y of Treas., Dep't of Treas., *Recent Developments in*

U.S. Financial Markets and Regulatory Responses to Them, Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs, 110th Cong. 5 (July 15, 2008).[8] Many of the financial analyses and projections underpinning those and other such statements were likely created prior to July 1, 2008, and those analyses are directly relevant to the Companies' condition when they were placed in conservatorship shortly thereafter. For that reason, the Court should approve a beginning date of April 1, 2008.

CONCLUSION

The Court should order the Government to search ESI and produce responsive, non-privileged materials created from June 1, 2011 to March 31, 2013 and from April 1, 2008 to December 31, 2008. The Government should also be directed to provide Plaintiffs with ESI search reports relating to any ESI searches it runs, so that Plaintiffs, and if necessary the Court, can monitor, on a search term by search term and a custodian by custodian basis, the number of documents returned by the Government's ESI searches and compare those results to the volume of documents actually produced by the Government or withheld as privileged.[9]

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[8] *See also* Sen. Christopher Dodd, quoted in Bloomberg News – Justin Blum, *Fannie Mae, Freddie Mac Are in 'Good Shape' Dodd Says* (July 13, 2008, 2:36 PM) (stating that the Companies were in "good shape" and had "more than adequate capital"), http://bloom.bg/1nxwXN1; Testimony of Ben S. Bernanke, Federal Reserve Chairman, before H. Comm. on Fin. Servs. (July 16, 2008) ("The GSEs are adequately capitalized. They are in no danger of failing.").

[9] At a minimum, should the Court use different dates than those proposed by Plaintiffs to govern the Government's review and production of ESI during any "first wave" of discovery, it should nonetheless direct the Government to run its ESI searches for the dates proposed by Plaintiffs and to provide reports documenting the number of unique documents returned by those searches. It is Plaintiffs' understanding that the Government has already loaded, or could soon load, all of the agreed-upon custodians' ESI for all relevant dates into its ESI search engines. There should therefore be relatively little additional burden for the Government to run the ESI search for the entire date range proposed by Plaintiffs, even if it then reviews only a subset of the documents returned by those searches. The search reports generated by those searches would, among other things, allow the parties and the Court to more meaningfully assess the actual burden associated with Plaintiffs' proposal.

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Respectfully submitted,

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